

The Rule on the Exhaustion of Local Remedies in Law of the Sea Disputes in ASEAN

Datin Mary George*

I. Introduction

This paper examines the Rule on the Exhaustion of Local Remedies in ocean law dispute settlement options in ASEAN covering areas such as the Straits of Malacca and Singapore, the South China Sea, the Gulf of Thailand, the Gulf of Tonkin, the Lombok and Makassar Straits and the Celebes Sea. The current dispute settlement options fall under the ASEAN treaty system and the United Nations (UN) system. The core argument advanced in this paper is that the ASEAN littoral States should promote the Rule on the Exhaustion of Local Remedies which requires Alternate Dispute Resolution (ADR) mechanisms, such as arbitration, mediation, negotiation, conciliation and conduct of diplomatic relations and good offices in the peaceful settlement of disputes as required under the 1982 Law of the Sea Convention (LOSC).

The current trend in ocean disputes settlement shows that ADR techniques like mediation, negotiation and good offices are only partially successful in settling these disputes. International law recognises the value of ADR in numerous treaties, a sampling of which is presented in this paper. International law itself does not use the term and its acronym ADR but it requires States to comply with the rule upon failure of which the dispute may be submitted to the international adjudicatory bodies.

* LLB (Bangalore), LLM (London), PhD (Sydney); Associate Professor, Faculty of Law of the University of Malaya, Kuala Lumpur, Malaysia.

II. The Rule on the Exhaustion of Local Remedies

With the end of the Second World War and the establishment of the United Nations, the call to settle disputes between and amongst nations by peaceful means has taken the world by storm. International law repeats the importance of ADR in several treaties. The forces of international law exert considerable influence upon States in their determination of a particular choice for dispute settlement. The term "Peaceful" at international law should connote elements of both non-aggressive and non-military conduct. The concern of international law is that the dispute if prolonged will endanger international peace and security. Article 33 of the Charter of the United Nations beckons parties to any dispute to seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. Power is vested in the Security Council to call upon the parties to settle their disputes peacefully. In the international treaty making fora, Article 33 is repeated in several other legal instruments and conventions, for example:

- (i) Paragraph 15 of the Declaration of Principles Governing the Sea-Bed;
- (ii) Article 65(3) of the 1969 Vienna Convention on the Law of Treaties;
- (iii) Article 9 of the 1958 Convention on Fishing and Conservation of Living Resources of the High Seas; and
- (iv) Article 4 of the 1947 Treaty between Turkey and Jordan.

A. *Free Choice of Means and Binding Decisions*

The 1970 United Nations Declaration on Friendly Relations calls upon States to seek early and just settlement of their international disputes, with a call to try another set of options should the first option fail. The

underlying basis for this posture is the recognition that all States are sovereign equals and the recognition of the principle of free choice of means. States are continuously called upon to enter into regional or international arrangements of their own choice in this matter for present and future disputes entailing a binding decision. Article 95 of the United Nations Charter has explicitly provided for the freedom of entrustment by States of their differences to other tribunals according to agreement.

Some Conventions such as Article 28(1) of the European Convention for the Peaceful Settlement of Disputes, Article 29(1) of the Geneva General Act for the Pacific Settlement of International Disputes and Article 219 of the Treaty Establishing the European Community generally provide for the same substantive rule; that legal disputes should be settled by binding decision in accordance with the procedure laid down in a respective convention by the parties. This does not mean that there cannot be clauses relating to settlement procedures not entailing a binding decision. Parties may choose time-limits, adopt a concept of reasonable time and a concept of relevant circumstances to enable dispute resolution to be followed by binding methods. Then there is the example of Article 16(1) of the 1965 Convention on Transit Trade of Land-Locked Countries which states that disputes not settled within a period of nine months shall at the request of either party, be settled by arbitration.

Where the parties involved are governments, the preferred dispute settlement mechanism is arbitration which is set out in a separate annex to a convention. For instance, Article 41 of the 1954 Belgium-Yugoslav Agreement on Social Security states that the arbitral body shall settle the dispute according to fundamental principles and in the spirit of the present Agreement. Article 7 of the 1952 United Kingdom - Belgium General Agreement on the Establishment of a British Military Base in Belgium states that the arbitrator shall be selected by agreement between the two Governments. If after two months from the date of request of either Government to submit the dispute to arbitration, the two Governments have not agreed on the choice of the arbitrator, he shall be chosen by the Secretary-General of the North-Atlantic Treaty Organisation.

Article 10 of the International Maritime Consultative Organisation (IMCO) (as it then was) Convention for the Prevention of Pollution from Ships 1973 provides that any dispute between two or more Parties to the Convention concerning the interpretation or application of the present Convention shall, if settlement by negotiation between the Parties involved has not been possible, be submitted upon request of any of them to arbitration as set out in the Protocol to the Convention. Interestingly, another format is found in Article 11 of the European Interim Agreement on Social Security 1953 where in Clause 3, the parties provide that where the dispute has not been settled by negotiation within a period of three months, it shall be settled by arbitration or in default of such agreement, within a further period of three months by an arbitrator chosen at the request of any of the Contracting Parties concerned by the President of the International Court of Justice (ICJ). Article 9 of the Genocide Convention of 1948 and Article 64 of the 1965 Convention on the Settlement of Investment Disputes call upon States to submit the unresolved dispute to the ICJ.

If ADR techniques fail, then it is likely that the parties may choose to submit to the ICJ.¹

The international organizations set up for dispute resolution are the Permanent Court of Arbitration (PCA), the ICJ (formerly the PCIJ) and numerous other mixed claims commissions established by the concerned State parties.² After the conclusion of the United

¹ There are four articles of the Statute of the ICJ that deserve special mention, namely Articles 26, 27, 28 and 29. These articles empower the Court to form one or more chambers from time to time for dealing with particular categories of cases. A judgment given by the chambers is considered to be a judgment rendered by the court. The chambers may sit and exercise their functions elsewhere than at The Hague. To speedily dispose cases, the Court is annually required to form a chamber composed of five judges which at the request of the parties, may hear and determine cases by summary procedure. For judges who find it impossible to sit, replacements are appointed. (See Rules of the ICJ).

² See Hudson, Manley, *By Pacific Means: The Implementation of Article Two of the Pact of Paris* (London: Yale University Press, 1935) at pp 5-20.

Nations Conference on the Law of the Sea (UNCLOS) I in 1958, the Optional Protocol of Signatures Concerning the Compulsory Settlement of Disputes was drafted and a dispute was a cause of action that was defined under Article 40 of the Statute of the ICJ. Disputes are brought before the ICJ once the first rule in international law is satisfied, that is, that States are entitled to assert their rights at international law when they bring claims on behalf of their citizens or companies once the rules on the nationality of claims and on the exhaustion of local remedies have been fulfilled. The five original States of ASEAN are members of the UN and have acquiesced in the present rules of international law for dispute settlement and to this extent they have adopted a UN General Assembly Resolution 2103 (XX), 20 December 1965 where they declared:

The faithful observance of the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations is of paramount importance for the maintenance of international peace and security and the improvement of the international situation.

Chapters VI to VIII of the UN Charter provide for the pacific settlement of disputes, and for action that may be taken by the Security Council with respect to threat to peace and regional arrangements that may be resorted to by states for the maintenance of international peace and security. Article 33 on preventive diplomacy, requires parties to any dispute to seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. The Security Council has the power under this article to call upon the parties to settle their dispute by such means. Article 34 empowers the Security Council to investigate any dispute, or any situation that could lead to international friction or give rise to dispute in the maintenance of international peace and security.

Under Article 35, UN member States may bring any dispute to the attention of the Security Council or the General Assembly. Even a non-member State may bring a dispute to the attention of the

General Assembly or the Security Council provided it accepts in advance the obligation of pacific settlement as provided in this Charter. Article 36 is significant as it states that in making recommendations, the Security Council should as a general rule in all legal disputes ensure that the parties refer the dispute to the ICJ. Where the parties fail to settle a dispute under Article 33, they are required to submit the same to the Security Council. Where in the opinion of the Security Council, the dispute is likely to endanger international peace and security, it may decide to settle under Article 36 or recommend terms of settlement as it considers appropriate. Article 38 provides that without prejudice to Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

Article 66 of the 1969 Vienna Convention on the Law of Treaties deals with procedures for judicial settlement, arbitration and conciliation of issues and refers States to Article 33 of the UN Charter to settle a dispute. Under the terms of Article 66, where no solution has been reached within a 12 month period, any of the parties to a dispute concerning the application or the interpretation of Articles 53 or 64 of the Vienna Convention 1969 may, submit the matter in writing to the ICJ for a decision, unless the parties consent to submit the dispute to arbitration. The other method is for the parties, to a dispute concerning the application or the interpretation of any other article in Part V of the Vienna Convention of 1969 according to the procedure specified in the Annex to the Convention, to submit a dispute to the Secretary General of the UN.

III. ASEAN

To understand ASEAN and its law of the sea conflicts is to place a finger on its pulse where the rhythm of its heartbeat reveals a cautious approach. Setting aside their differences in culture, language and creed, understanding their strategic position, their archipelagic status, their riches, ethnic and cultural ties, five states - Indonesia, Malaysia, Thailand, the Philippines and Singapore in South-East Asia formed the

ASEAN bloc³ in August 1967 as the founding members.⁴ Nine years

³ See <http://www.aseansec.org>, accessed on 7 April 1999. For an understanding on ASEAN see, Hong, SJ, *Regionalism in South-East Asia: A Study of ASEAN* (Kuala Lumpur: Perpustakaan Universiti Malaya, 1992), Dissertation MA, Jabatan Pengajian Asia Tenggara, Fakulti Sastera dan Sains Sosial, Universiti Malaya, 1992; Hassan Fuad, *ASEAN and its Prospect for Development* (Djakarta: Lembaga Pertahanan Nasional, Departemen Pertahanan Keamanan, 1974); Rajendran, M, *ASEAN's Foreign Relations: The Shift to Collective Action* (PhD thesis), Griffith University, Australia, 1983; ASEAN Secretariat, *From Strength to Strength: ASEAN Functional Co-operation: Retrospect and Prospect* (Jakarta: ASEAN Secretariat, 1992); French Pace B, *Regional Co-operation in South-East Asia: The First Two Years of ASEAN: 1967-1969* (Mc Lean Va: Research Analysis Corporation, 1970); Danusaputro, SM, *Toward Regional Arrangement of Legal Development: An ASEAN Perspective* (Jakarta: Badan Pembinaan Hukum Nasional-Departemen Kehakiman, ud); Mahathir bin Mohamed *et al*, *Regionalism, Globalism and Spheres of Influence: ASEAN and the Challenge of Change into the 21st Century* (Singapore: Institute of South-East Asian Studies, 1989); Malaysia Kementerian Luar Negeri, *Facts on ASEAN* (Kuala Lumpur: Ministry of Foreign Affairs - Malaysia, 1977); Balakrishnan KS, *ASEAN: Sumbangan ke Arah Keselamatan Serantau* (Petaling Jaya: IBS Buku, 1990); Gill, R, *ASEAN: Coming of Age* (Singapore: Sterling Corporate Service, 1987); ASEAN, *The First 20 Years* (Singapore: Federal Publications, 1987); Rajendran, M, *ASEAN's Foreign Relations: The Shift to Collective Action* (Kuala Lumpur: Arenabuku Sdn Bhd, 1985); Jorgensen, DA, *Regional Organisation and Order in South-East Asia* (London: MacMillan, 1982); Hamzah bin Muhamad Kassim, *An Institutional Comparative Study of Regional Organisations with special emphasis on ASEAN* (Kuala Lumpur: University of Malaya, 1976) Academic Exercise (LLB), Faculty of Law, Universiti Malaya, 1976; Saipiroon, P, *ASEAN Governments' Attitudes Towards Regional Security 1975-1979* (Bangkok: Institute of ASEAN Studies, 1982); Nishikawa J, *ASEAN and the United Nations System* (New York: United Nations Institute for Training and Studies, Research, 1983); Quisimbing, P V, *Can ASEAN Forge a Viable Legal Regime for Regional Co-operation?* (Quezon City: College of Law, University of the Philippines, 1981) Reprinted from (June 1981) 56 *Philippine Law Journal*; Ronald P D *et al*, *Building ASEAN: 20 Years of South-East Asia Co-operation* (New York: Praeger, 1987); Karl D *et al* (eds), *ASEAN in Regional and Global Context* (Berkeley, California: Institute of East Asian Studies, University of California, 1986) Revised Papers from the Third US-ASEAN Conference, ASEAN in Regional and International Context held in Chiang Mai, Thailand, 7-11 January 1985. Sponsored by the Institute of East Asian Studies, University of California, Berkeley, Institute of Security and International

later the 1976 ASEAN Treaty of Amity and Co-operation⁵ was signed. Article 18 of the 1976 ASEAN Treaty of Amity and Co-operation clearly states that it shall be open for accession by other States in South-East Asia. However, new States must be accepted by the other member States. The five countries made their intention clear to remain open to negotiations with the other countries in South-East Asia on matters of vital interest such as regional peace, stability and co-operation.⁶ Brunei Darussalam was admitted to membership on 7 January 1984.⁷ As the political environment in South-East Asia improved, Vietnam joined the Association in July 1995,⁸ and Laos and Myanmar were admitted as members on 23 July 1997.⁹ The decision

Studies, Chulalongkorn University, Bangkok and Centre for Strategic and International Studies of Jakarta, Indonesia; Chapter VIII, Articles 52 to 54 of the UN Charter also encourages States to enter into regional arrangements, Brownlie I (ed), *Basic Documents in International Law* (Oxford: Clarendon Press, 1984) at p 2.

⁴ Shearer, I A, "Association of South-East Asian Nations" in Bernhardt R (ed), *Encyclopaedia of Public International Law: Vol 6 entitled Regional Co-operation, Organisations and Problems* (Amsterdam: North Holland, 1983) at pp 25-28.

⁵ 1025 UNTS 297. Purificacion Valera Quisimbing & Elizabeth Aguilin-Pangalangan, (eds), *ASEAN Regional Law Series: Vol 1: Vital ASEAN Documents - 1967-1984 with Annotations and Index* (Quezon City: Academy of ASEAN Law and Jurisprudence, University of the Philippines Law Complex, 1985) at p 143.

⁶ Nishikawa J, *supra* n 3 at p 8.

⁷ Purificacion and Elizabeth, *supra* n 5 at p 50.

⁸ (1996) 35 *ILM* 1063 at p 1067.

⁹ See the ASEAN-Mekong Basin Development Co-operation as follows: The ASEAN-Mekong Basin Development Co-operation, initiated by ASEAN leaders at the same summit in Bangkok, envisions laying down the foundations to energise economic and social development of the entire Mekong Basin. This is another shining example of the potentiality of ASEAN and the Mekong Riparian States to do great things together, on their own initiative and with the co-operation of others to determine the nature, dimension and pace of development in their own region. "This Meeting should endorse the Basic Framework of ASEAN-Mekong Basin Development Co-operation which was adopted by the Ministerial Meeting of ASEAN and the Mekong Riparian States in Kuala Lumpur in June 1996". See the opening statement by HE Datuk Abdullah Haji Ahmad Badawi, Minister of Foreign Affairs of Malaysia

to admit Cambodia as a member was taken on 16 December 1998. ASEAN considered a success by its leaders¹⁰ is thus moving closer to the fulfillment of the vision of the founders' that eventually all the countries of South-East Asia will be living in harmony and co-operation within the ASEAN fold.¹¹ The bloc remains bound by reason of their benefits flowing from their unity. Now that ASEAN comprises the full 10 neighbours it is expected to operate as the smooth passage to preventive diplomacy vital to the region and to the Asia-Pacific as a whole.¹² The constitutive instruments of ASEAN are:

at the Twenty-Ninth ASEAN Ministerial Meeting, Jakarta, 20 July 1996 in *Twenty-Ninth ASEAN Ministerial Meeting (AMM), Post Ministerial Conferences with Dialogue Partners (PMC), and Third ASEAN Regional Forum (ARF)* (Jakarta: ASEAN Secretariat, 1996) at p 20.

¹⁰ Opening Statement by HE Professor Jayakumar S, Minister for Foreign Affairs of Singapore at the Twenty-Ninth ASEAN Ministerial Meeting, Jakarta, 20 July 1996. *Id* at p 29.

¹¹ Keynote Address delivered by HE President Soeharto of the Republic of Indonesia at the Twenty-Ninth ASEAN Ministerial Meeting, Jakarta, 20 July 1996. *Id* at p 9 to 10; "All ten are parties to the Treaty of Amity and Co-operation in South-East Asia. All ten are signatories to the Treaty on the South-East Asia Nuclear Weapon-Free Zone. We are thus significantly closer to the fulfillment of our founders' vision of a South-East Asian community within ASEAN". - Opening Statement By HE Mr Domingo L Siazon Jr, Secretary of Foreign Affairs of the Philippines at the Twenty-Ninth ASEAN Ministerial Meeting, Jakarta, 20 July 1996. *Id* at p 25.

¹² On Cambodia's membership, see Opening Statement By HRH Prince Mohamed Bolkiah, Minister of Foreign Affairs of Brunei Darussalam at the Twenty-Ninth ASEAN Ministerial Meeting Jakarta, 20-21 July 1996. *Id* at p 18. The Asian group of nations has often been considered heterogeneous and divergent in the fora of the United Nations. This impression is derived from the fact that the nations differ in political, economic, cultural and religious senses. It includes centrally-planned economies and market economies, developed economies and developing economies (including LDDC), big countries which are archipelagos and small countries some of which are only islands, see Nishikawa J, *supra* n 3 at p 2; For the differences in the peoples, religions, languages, politics, military elites, rural dilemmas and development spectrum of ASEAN, see Broinowski A (ed), *Understanding ASEAN* (Hong Kong: The MacMillan Press Ltd, 1983) at pp 196-237. ASEAN also has dialogue sessions with its Dialogue Partners - Australia, Canada, the People's Republic of China, the EU, India, Japan, Republic of Korea, New Zealand, the Russian Federation and the USA.

- (i) the ASEAN Declaration done at Bangkok on 8 August 1967;¹³
- (ii) the Agreement of Establishment of the Permanent Secretariat done at Bali on 24 February 1976;¹⁴
- (iii) the Declaration of ASEAN Concord done at Bali on 24 February 1976;¹⁵ and
- (iv) the Treaty of Amity and Co-operation done at Bali on 24 February 1976.¹⁶

ASEAN operates through its 1976 Treaty of Amity and Co-operation and the 1967 Declaration which set up the basic infrastructure.¹⁷ The purpose of the organisation has been to strengthen

¹³ (1967) 6 *ILM* 1233. Purificacion and Elizabeth, *supra* n 5 at p 27.

¹⁴ Purificacion and Elizabeth, *supra* n 5 at p 66.

¹⁵ (1967) 6 *ILM* 1233. Purificacion and Elizabeth, *supra* n 5 at p 33.

¹⁶ 1025 *UNTS* 297. Purificacion and Elizabeth, *supra* n 5 at p 143; This Treaty is registered at the UN according to Article 102 of the UN Charter and ASEAN has been recognised as an effective political regional organisation in the forums of the UN - Nishikawa J, *supra* n 3 at p 8; For Protocol Amending the Treaty of Amity and Co-operation in South-East Asia done at Manila, on 15 December 1987 see ASEAN Secretariat, *ASEAN Document Series: 1967 - 1988* (3rd ed) (ASEAN Secretariat: Jakarta, 1988) at 43; ASEAN Treaties, Declarations and Other Instruments, (1977) 19 *MalLR* at pp 407-416 and successive volumes.

¹⁷ The 1967 ASEAN Declaration provides for:

1. an annual meeting of foreign ministers, known as the Annual Ministerial Meeting (ASEAN Ministerial Meeting);
2. a standing committee under the chairmanship of the foreign minister of the host country of the meeting and having as its members the accredited ambassadors of the other member countries to carry out the work of ASEAN between the Annual Ministerial meetings;
3. *ad hoc* committees and permanent committees of specialists and officials on specific subjects; and
4. a national secretariat in each member country to carry out the work of ASEAN on behalf of that country and to service such annual or special meetings of ASEAN as may be held in the country, see Purificacion and Elizabeth, *supra* n 5 at p 66.

regional cohesion and self-reliance while emphasising economic, social and cultural co-operation and development.¹⁸ Through the years ASEAN has formed an effective network for security, stability and prosperity in the region by spearheading the ASEAN Regional Forum (ARF)¹⁹ and participating actively in several official and non-official summits such as the APEC, EAEC and the AFTA. The recently concluded Treaty on a Nuclear Weapon-Free Zone²⁰ in South-East

¹⁸ Purificacion and Elizabeth, *supra* n 5 at p 66. ASEAN remains committed to its Declaration of a Zone of Peace, Freedom and Neutrality (ZOPFAN), done at Kuala Lumpur on 27 November 1971, see Purificacion and Elizabeth, *supra* n 5 at p 34.

¹⁹ The current participants in the ASEAN Regional Forum (ARF) are as follows: Australia, Brunei Darussalam, Cambodia, Canada, China, European Union, India, Indonesia, Japan, Democratic Peoples' Republic of Korea, Laos, Malaysia, Myanmar, Mongolia, New Zealand, Papua New Guinea, Philippines, Russian Federation, Singapore, Thailand, United States and Vietnam. See <http://www.aseansec.org/amm/partcp.htm>, accessed on 25 August 2000.

²⁰ In pursuit of stability, the ASEAN countries from the very start focused on building national and regional resilience as a basis for regional economic growth while establishing a code of conduct for regional co-operation involving the countries of the region as well as external powers. In doing so ASEAN has become a major force for peace and stability as well as for economic co-operation not only in South-East Asia but also in the larger Asia-Pacific Region. ASEAN was a prime mover in the peace process that led to the rebirth of Cambodia. In 1994, ASEAN launched the ARF in the hope that through dialogue and consultation on political and security matters, strategic change in the region could be managed in such a way that a stable relationship among the major powers and the regional powers could evolve peacefully over the next decade. For Treaty on Nuclear Weapon-Free Zone see (1996) 35 *ILM* 635 and Protocol thereto (1996) 35 *ILM* 649. This treaty is not meant to undermine the security policies of the nuclear weapon States but rather to achieve security for all countries in the region, see Opening Statement by HE Mr Ali Alatas, Minister for Foreign Affairs of the Republic of Indonesia at the Twenty-Ninth ASEAN Ministerial Meeting, Jakarta, 20 July 1996. See *supra* n 9 at p 14; "ASEAN must not delay its ratification of the South-East Asian Nuclear Weapon-Free Zone (SEANWFZ) Treaty. The treaty is an abiding testimony of ASEAN's resolve to contribute to nuclear non-proliferation. We must persevere in our efforts to expand the circle of consensus for the eventual elimination of all nuclear and other weapons of mass destruction" - Opening Statement By HE Datuk Abdullah Haji Ahmad Badawi, Minister of Foreign Affairs of Malaysia at the Twenty-Ninth ASEAN

Asia represents a major milestone to keep this area free of nuclear weapons. The amendments to the 1976 Treaty of Amity and Co-

Ministerial Meeting, Jakarta, 20 July 1996, *supra* n 9 at p 21. ASEAN believes that this web of arrangements and processes which complement one another in a positive and synergistic way would be complete if all the nuclear countries would endorse the Nuclear Weapon-Free Zone (NWFZ) in South-East Asia by acceding to its attached protocol, see Keynote Address by HE President Soeharto of the Republic of Indonesia, at the 29th ASEAN Ministerial Meeting, Jakarta, 20 July 1996. See *supra* n 9 at pp 10-12. One of the aims of this Treaty is to protect the region of South-East Asia Nuclear Weapon Free Zone from environmental pollution and the hazards posed by radioactive wastes and materials. Radioactive materials and radioactive wastes have a similar meaning. Radioactive materials mean materials that contain radionuclides, above clearance or exemption levels recommended by the International Atomic Energy Agency, see Article 1(e), Treaty on Nuclear Weapon-Free Zone. Radioactive wastes are wastes which contain or are contaminated with radionuclides and for which no use is seen, see Article 1(f), Treaty on Nuclear Weapon-Free Zone. Dumping is defined as in the 1982 LOSC, see Article 1(g), Treaty on Nuclear Weapon-Free Zone. The geographical scope of the convention comprises territories of all States in South-East Asia, namely, Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam and their respective continental shelves and EEZs, see Article 1(a), Treaty on Nuclear Weapon-Free Zone. Territory encompasses the land territory, internal waters, territorial sea, archipelagic waters, the seabed and subsoil and the airspace above them, see Article 1(b), Treaty on Nuclear Weapon-Free Zone. The convention guarantees the right of all States to use nuclear energy for peaceful purposes such as economic and social progress, see Article 4, Treaty on Nuclear Weapon-Free Zone. The significance of this bloc is that it started out with the principal objective of stabilising the political climate and defence co-operation where possible, (though officially it remained non-aligned), and has now progressed into an important forum for States in the region to prepare and face up to international challenges that come their way, for example to take a unified position *vis-à-vis* trade measures in international environmental agreements and trade measures used unilaterally in Japan, the United States and the EU for environmental purposes. See Huxley T, *Insecurity in the ASEAN Region* (London: Royal United Services Institute for Defence Studies, 1993); Mak J N, *Directions For Greater Co-operation* (Kuala Lumpur: Institute of Strategic and International Studies, 1986) for an overview on defence issues and ASEAN Secretariat, *Trade and Environment*, (Jakarta: ASEAN Secretariat, 1995) at p 8.

operation in 1987²¹ and 1998²² focused on enlarging the personal scope of the 1976 Treaty of Amity and Co-operation to enable other non-ASEAN States within and beyond South-East Asia to accede to the 1976 Treaty. Such accession was subject to the consent of the members of the 1976 Treaty. In 1987, there were only six such ASEAN member States, namely Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand. By 1998, ASEAN comprised all ten States.

IV. Ocean Law Disputes

As the volume of intra-ASEAN trade grows and walls between peoples and States are broken down²³ to enhance consumer and social movement, it becomes necessary to address the issue of dispute resolution. This reality is captured in the law of the sea and the plethora of treaties, such as those of the International Maritime Organisation (IMO), that it draws together for its implementation. The nature of disputes, the character of disputants and method of settlement have to be assessed given the dispute settlement options available at international law in general and law of the sea in particular.

The disputants within the scope of this paper are States Parties, international-intergovernmental organisations, any specialised agency of the United Nations, and any non-governmental international organisation and any National Liberation Organisation whose credentials are accepted by the General Assembly of the United Nations for admission to the GA. Whilst it is generally acknowledged that States are sovereign equals, this principle of sovereign equality of States has not been extended to the range of disputants mentioned above.

²¹ See http://www.aseansec.org/poliitcs/pol_agr4.htm, accessed on 25 August 2000.

²² See http://www.aseansec.org/politics/pol_agr3htm, accessed on 25 August 2000.

²³ To borrow the metaphor used by Prof Shih Choon Fong, President of the National University of Singapore in His Excellency's Public Lecture "The Changing Educational Landscape in a Globalizing World: Re-Making the University", delivered on 22 November 2005 at the Faculty of Law, University of Malaya.

The Module on Dispute Settlement, Regional Approaches, ASEAN, prepared at the request of the United Nations Conference on Trade and Development, has set out the various modes of dispute settlement in international trade, investment and intellectual property in ASEAN. It does not cover ocean-related disputes.²⁴

Disputes between ASEAN nations and citizens that are regulated by maritime contracts for goods and services and related and incidental issues thereto are covered under the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism and are not within the scope of this article. The need for a genuine link between a claimant and the State, issues of nationality of individuals and of registered businesses fall within the domestic purview of States. At international law when States espouse the claims of their nationals or registered business practices, they are asserting their rights as subjects of the international legal system. To press a claim at the international level, the rule on the exhaustion of local remedies needs to be fulfilled. Members of ASEAN have three choices for dispute settlement in International Law of the Sea. At the regional level, there is the ASEAN High Council and the Kuala Lumpur Regional Centre for Arbitration,²⁵ besides other recently established centres such as the

²⁴ There are concurrent other non-ocean law related issues to be settled between ASEAN States such as those between Malaysia and Singapore on a variety of issues for example, the delivery of fresh water to Singapore, land reclamation, and bridge construction. Separatist violence in Thailand's predominantly Muslim southern provinces has prompted measures to closely monitor the border between Malaysia and Thailand to stem further terrorist activities. Malaysia also has land boundary problems with Brunei around the Limbang area. These issues are not covered here.

²⁵ While the parties seek to resolve a dispute bilaterally, very often they are unable to, and agree to submit the dispute to the ICJ. However, they also face difficulties in the nature of the Agreement that they have to adopt to submit the dispute to the ICJ, depending upon whether the concerned State is willing to accept the compulsory jurisdiction of the court, see for example, the *Pedra Branca Light House Dispute*. The Kuala Lumpur Regional Centre for Arbitration set up under the aegis of the Asian-African Legal Consultative Committee would be able to handle disputes of this nature. However, this case is *sub-judice* before the ICJ at present and the comments are the author's alone. This case has since been decided by the ICJ on 23 May 2008.

Singapore and Vietnam International Arbitration Centres. Failing resolution and adjudication at this point, the international adjudicatory bodies are the ICJ, the International Tribunal for the Law of the Sea (ITLOS) and the PCA.

Ocean law disputes, *inter alia*, stem from a violation of navigational²⁶ and environmental regulations, overlapping exploitation of living and non-living resources including Illegal, Unlawful and Unreported (IUU) fishing, atmospheric pollution, and transboundary transportation of wastes. Likewise, military espionage, piracy, terrorist activities and other maritime security challenges are of immediate concern. The delimitation of maritime boundaries, Exclusive Economic Zone (EEZs) and continental shelves,²⁷ intellectual property rights of

²⁶ The Straits of Malacca and Singapore are a heavily trafficked strait. The type and total number of vessels that report to the Port Klang Vessel Traffic System (VTS) situated on the west coast of Peninsular Malaysia include very large crude carriers, deep draft crude carriers, tanker vessels, liquid nitrogen gas/liquid petroleum gas carriers, cargo vessels, container vessels, bulk carriers, ro-ro/car carriers, passenger vessels, livestock carriers, tug/tow vessels, government/navy vessels, and fishing vessels. The characteristics of navigation through the Straits require special attention and alertness from several stakeholders such as the user State and the strait State. Navigational difficulties require State maritime authorities to promulgate navigational warnings and to respond to emergencies. To enhance the existing safety measures, the maritime authority at Port Klang had conducted a survey of critical areas and investigation of dangerous and unconfirmed shoals and wrecks for the safe passage of vessels transiting through the straits. The existing aids to navigation have been upgraded with the addition of the extra RACON system, maritime electronic highway and electronic navigational charts. The rules on navigation through the VTS are based on the Collision Regulations of the IMO. Whenever a vessel infringes a technical rule of navigation, as adopted in the VTS, such a vessel passing through a particular reporting point is required to make a report *via* the VHF through appropriate channels declared by the authority. The VTS operator will then advise the Master to comply with such rules as are applicable to the strait. Data obtained at a personal interview between the Navigational Officer at the Marine Department and the author in August/September 2004.

²⁷ Article 15 on delimitation of the territorial sea between States with opposite or adjacent coasts, states that where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement

marine scientists, national and regional maritime security issues and even maritime crimes and terrorism are all potential flashpoints. The acquisition of title to territory whilst strictly a matter regulated under the domain of public international law, in so far as it relates to the determination of a valid baseline, could fall under ocean law disputes too.

Land reclamation activities which ought normally to fall under domestic legal systems, may creep into ocean law where the impugned activity causes marine pollution or endangers a critical habitat of the marine ecosystem. The nature and type of dispute is further complicated

between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. This provision does not apply to territorial seas with a historic title. There is no similar provision on dispute settlement for straits used for international navigation or for archipelagoes. However, Article 34 is a reminder that other rules of international law also apply to straits. Article 59 on the EEZ provides that the basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the EEZ should be equity taking into account the relevant circumstances and the respective importance of the interests involved to the parties as well as to the international community as a whole..

Article 73 on the delimitation of the EEZ between States with adjacent or opposite coasts states that this is to be effected by agreement on the basis of international law as referred to in Article 38 of the Statute of The ICJ in order to achieve an equitable solution. Article 74 further states in para 2 that if an agreement cannot be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV. In para 3, it is further stated that pending agreement as provided for in para 1, the States concerned in a spirit of understanding and co-operation, shall make every effort to enter into provisional agreements of a practical nature, and during this transitional period, enjoins States not to jeopardize or hamper the reaching of the final agreement. Such arrangements are without prejudice to the final delimitation. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the EEZ shall be determined in accordance with provisions of that agreement. Similar provisions are also found in Article 83 on the Delimitation of Continental Shelf between States with opposite or adjacent coasts.

by the zone in which the activity took place and the nationality of the offender. To add to this list, the different treaties and protocols that govern the various matters have also to be taken into consideration when deciding upon the option. Differences of opinion in interpreting the treaties are also a source of dispute as is recognised in Article 48(1) of the 1961 Single Convention on Narcotic Drugs and Article 11(1) of the 1959 Antarctic Treaty. Ocean law disputes are bound to arise where there has been an infringement of easementary, usufructuary, possessory or ownership rights by States, by their natural or juridical or legal persons.

In the law of the sea, there are political and legal disputes and usually a legal dispute may include political elements and geographical considerations. The common areas of dispute involve not only legal principles relating to the law of the oceans but also a combination of legal and natural geographical features relating to baselines, maritime zones, title to territory, *uti possidetis juris*, inter-temporal laws, *non-liquet* situations, sustainable development of the seas and oceans, obtaining information by false methods such as prohibited marine scientific research and illegal transfer of marine technology, illegal and unlawful military and strategic use of the seas, military air and naval activities, to name a few. While the conference on the law of the sea rejected a classification of disputes, it included disputes concerning the interpretation or application of the Convention. Presumably this does not include conflicts that could arise under Article 311 that deals with the relation between the 1982 LOSC with other conventions and international agreements. However, Part XV which deals with judicial and non-judicial solutions only deals with disputes that arise out of the interpretation or application of the provisions of the Convention.

In the settlement of disputes, Article 295 of the 1982 LOSC refers to the exhaustion of local remedies for it is an obligation on the part of States to exhaust local remedies before submitting a dispute regarding the Convention to compulsory procedures entailing binding decisions. The 1982 LOSC though it envisions conflicts between States in several articles, stresses on the nature of the outcome of a conflict resolution, that is, the outcome has to be equitable and except

in Article 74, seldom provides the need to resort to any particular or general method of conflict resolution. The term "dispute" has not been defined. Raymond Ranjeva in the Chapter entitled "Settlement of Disputes" in Dupuy-Vignes, *A New Handbook on the Law of the Sea*, Vol 2 points to the practice of the ICJ:

The practice of the International Court of Justice is to establish the existence of a dispute between parties on the date when an action is brought. In order to do so, it checks whether the respondent State objects to the applicant's claim. Although the form of the claim is of relatively little importance, international jurisdiction requires that the object of the dispute be defined: "a difference of views which has not been capable of otherwise being overcome" (Judgment of 16 December 1927. *Interpretation of Judgments Nos 7 and 8 (Factory at Chorzow)*, PCIJ Series A, No 13, pp10-11).²⁸

However, the critical date of the dispute can be ascertained under the general principles of public international law. Similarly, the term "equitable outcome" has not been defined but is generally understood to be fair and equal.

A. *Baselines, Uti Possidetis Juris and Territorial Claims*

Overlapping baselines, boundaries *uti possidetis juris* and territorial claims require prior consultation and good offices amongst the States. As valid baselines are critical in ocean law, many of the problems in the acquisition of title to territory in the ASEAN seas stem from a lack of valid and authentic baselines drawn in accordance with the rules in the 1982 LOSC which in turn incorporates the rules under customary international law including the principle of *uti possidetis juris*.

When Malaysia extended her territorial sea from three nautical miles to 12 nautical miles in August 1969, she published the New

²⁸ See Raymond Ranjeva, Chapter entitled "Settlement of Disputes" in Dupuy-Vignes, *A Handbook on the New Law of the Sea*, Vol 2 (Martinus Nijhoff: Dordrecht, 1991) at p 1340.

Malaysian Map or *Peta Baru* in 1979 which seemed to rekindle the competing territorial claims in the region. This New Malaysian Map of 1979 triggered several claims by other littoral States in the Straits of Malacca and Singapore and in the South China Sea. Haller-Trost has documented some of the problems that arose in the Straits that related to territorial claims to islands, and rocks in the Straits and the South China Sea.²⁹ In April 1980 and June 1989, Singapore protested over the Malaysian claim of ownership of Pulau Batu Puteh or Pedra Branca at the eastern entrance of the Strait of Singapore. In February 1980, Indonesia claimed the Pulau Sipadan and Pulau Ligitan islands in the Celebes Sea/South China Sea which were also under Malaysian sovereignty. In March 1980, the Philippines claimed some of the Spratly Islands and reefs of the southern Spratlies in the South China Sea much to the bitter resentment of other claimant States. In May 1980, Beijing sent a protest note concerning the Spratly Islands to several States contesting their claim to the Spratlies. In April 1980, Thailand sent an *aide-memoire* protesting against the New Malaysian Map of 1979 alleging that it did not show the area of overlapping zone in the continental shelf between Malaysia and Thailand, in the Gulf of Thailand, that was meant to be jointly exploited. In April 1980, Taiwan made a formal statement that the Spratly Islands had always been a part of the Republic of China. In August 1980, Britain protested on behalf of Brunei that the New Malaysian Map did not correctly represent the Sultanate's continental shelf rights. After Vietnam released the 1982 Declaration on Baselines and issued repeated protests, Malaysia construed this act as Hanoi's first protest concerning the Spratly Islands.

With regard to three of the above disputes, the ASEAN littoral States have demonstrated a proclivity towards the ICJ and the ITLOS as follows:

- (i) Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) (ICJ, 1998-2002).

²⁹ See Haller-Trost R, *The Spratly Islands: A Study on the Delimitation of International Law* (Canterbury: University of Kent at Canterbury, Centre of South-East Asian Studies, 1990).

- (ii) Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore) (ITLOS, Provisional Measures) (Order of 8 October 2003).
- (iii) Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (ICJ, 2003 -) (sub-judice).³⁰

The two cases on sovereignty were submitted to the ICJ and the third on provisional measures was submitted to ITLOS.³¹ In the case concerning Sovereignty over Sipadan and Ligitan islands in the South China Sea, the ICJ ruled in favour of Malaysia. In the Land Reclamation Case, ITLOS did not rule in favour of either party, but

³⁰ This case has since been decided by the ICJ on 23 May 2008.

³¹ The ITLOS: Annex VIII deals with Special Arbitration. The disputes that arise under Part III of the 1982 LOSC fall under this Annex. Article 1 which deals with the institution of proceedings provides that:

Subject to Part XV, any party to a dispute concerning the interpretation or application of the articles of this Convention relating to (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, or (4) navigation including pollution from vessels and by dumping, may submit the dispute to the special arbitral procedure provided for in this Annex by written notification addressed to the other party or parties to the dispute. The notification shall be accompanied by a statement of the claim and the grounds on which it is based.

The parties to the dispute may authorise the special tribunal to carry out an inquiry and establish the facts giving rise to the dispute under Article 5 of this Annex. As far as Part III is concerned, since the 1982 LOSC expressly provides for the rights and freedoms of navigation and overflight of all user States, only those two issues may be submitted for arbitration or conciliation under Article 284(1) read with Annex V. The 1982 LOSC has rather dissatisfactory provisions on Part III on the regime of straits used for international navigation where some key areas of the law remain unstated. These are referred to as the Unstated Provisions and issues that fall under these Unstated Provisions may be settled under the general principles of public international law, for the balance arrived at, at UNCLOS III was a political balance. For example, the dispute resolution mechanisms for international straits are not mentioned in the 1982 LOSC. Therefore recourse, may be had to traditional methods of dispute settlement, namely, ADR

required the two States to meet and discuss the progress and future of the land reclamation activity. In all three cases, the States went

techniques, and resort to the ICJ. Reparation may be in the form of *restitution in integrum*, compensation or satisfaction.

The rule on *locus standi* may have to be revised to take into account, the rule on public interest dispute settlement whereby one State may compel another to file a suit and settle that matter peacefully. The 1982 LOSC is designed to operate within the existing international dispute settlement framework which comprises diplomatic and legal procedures. As part of the intrinsic judicial function of the ICJ, Article 36 of the Statute of the ICJ provides that:

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties or conventions in force.
2. The States Parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
 - (a) the interpretation of a treaty;
 - (b) any question of international law;
 - (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
 - (d) the nature or extent of the reparation to be made for the breach of an international obligation.

Part XV of the 1982 LOSC deals with the freedom of choice with respect to political procedures in Article 293 and other judicial and non-judicial procedures based on the common choice of the parties, a principle reiterated in Article 287 paragraph 4. The only limitation on this freedom of choice for parties is found in Article 297, paragraphs 2 and 3 in the context of sovereign rights of fisheries and scientific research in the EEZ or continental shelf. However, this restriction on freedom of choice is offset by the freedom of rejection of the solution. The preference of the Convention for binding solutions as opposed to optional solutions is stated in Article 282. However, parties to a dispute can derogate by agreement from the provisions of the 1982 LOS Convention. As explained by Ranjeva:

Silence is taken in all cases to mean acceptance of arbitration in accordance with Annex VII, as stated in paragraphs 3 and 5 of Article 287. The explanation for this is straightforward. Arbitration has two major advantages: the binding nature of the decision and the extensive possibilities for parties to participate actively in the proceedings. In

through diplomatic channels as an initial phase. In the Land Reclamation Case, diplomatic negotiations were fairly successful. The parties then proceeded to ITLOS for a judicial endorsement of the negotiations' outcome. The States parties adopted the traditional method of concluding Special Agreements to show their willingness to accept the Court's jurisdiction and to respect its decision. This practice is followed at the ICJ even though Malaysia has not accepted the compulsory jurisdiction of the Court under Article 36 of the Statute of the ICJ. Judge Shigeru Oda in his compelling article "The Compulsory Jurisdiction of the International Court of Justice: A Myth?"³² has reprimanded States that institute cases at the ICJ without the government of a State first

addition, the general structure of the Part XV machinery shows a gradual tendency towards institutionalizing judicial obligation. The process of dispute settlement under Part XV involves two successive stages:

(i) an initial phase of optional settlements by diplomatic negotiations (Article 283, exchange of views) (characteristics: compulsory to use but decision not binding; very seldom can resolve dispute this way but at least parties can settle on the preferred means for dispute settlement, no deadline imposed only to do so "expeditiously")

(ii) and optional (Part XV, section 1) and compulsory conciliation (Part XV, s 3; the procedure for both is the same and covered in Article 284 and Annex V) (characteristics of compulsory conciliation: subject matter of compulsory conciliation Article 297 paragraphs 1(a) (i), 2(b) and 3(b)). They are concerned with special case of non-historic sea boundary delimitations having arisen after the Convention entered into force and followed by breakdown of negotiations within reasonable time, historic bays or titles, marine scientific research in the EEZ or continental shelf and fisheries/living resources in the EEZ; a second phase of compulsory procedures entailing binding decisions if the first stage is not successful, (Section 2, Part XV). However, provision has been made for some exceptions to binding judicial decisions. By ratifying the Convention, coastal States agree *ipso jure* to compulsory conciliation for matters listed in paras 2 and 3 of Article 297.

³² See Judge Shigeru Oda, "The Compulsory Jurisdiction of the International Court of Justice: A Myth?" 49 *ICLQ* 2000, 251, at p 265.

exhausting diplomatic channels as an abuse of the right to institute proceedings before the Court. Where diplomatic negotiations failed as in the Pulau Sipadan and Pulau Ligitan Case, the States parties also opted to conclude a Special Agreement for submission of the case to the ICJ in accordance with Article 40, paragraph 1 of the Statute of the ICJ and under the terms of Article 36, paragraph 1 of its Statute. The ICJ examined the issue of treaty-based title to territory under the 1891 Convention between Great Britain and the Netherlands and other legislative, administrative and quasi-judicial acts of the governments of Indonesia and Malaysia. Based on the activities carried out by the government of Malaysia on the islands, it found that Malaysia had a fuller title to the islands in dispute. However, Judge Oda found the case to be a weak one as neither party demonstrated a strong support for its claims to title of the islands. As the Court was requested to choose between the two disputants in adjudging sovereignty, Judge Oda thought the Court reached a reasonable decision. The learned Judge pointed out that it was important to bear in mind the *causa causans* of the dispute which was summed up as follows:

[T]he existence of the islands of Ligitan and Sipadan has been known since the nineteenth century, but ... neither Indonesia nor Malaysia claimed sovereignty over them until the late 1960s. Any dispute that may have arisen at that time concerned only the delimitation of the continental shelf between the two States, which had become of interest because of submarine oil reserves, but not sovereignty over the islands.³³

Negotiations over the continental shelf in the area east of Borneo became deadlocked in September 1969 whereby the Parties agreed to suspend them. It is this date that represents the critical date in respect of the sovereignty dispute. When the two States granted Japanese oil companies exploration and exploitation concession in that area, they had to ensure that the zones did not overlap and that no violation occurred. In Judge Oda's opinion, contrary to the assertion

³³ *Id* at p 12.

in the Special Agreement, the only dispute in 1969 was the delimitation of the continental shelf. This would have been referred more properly to the Court by a joint agreement. Even the Philippines application to intervene in 2001 was with regard to the delimitation of the continental shelf between the parties. In Judge Oda's opinion the present case arose because the parties hoped to get a better bargaining position in the delimitation of the continental shelf. The law relating to the delimitation of the continental shelf in the sixties was Article 6, paragraph 1 of the 1958 Geneva Convention on the Continental Shelf. Judge Oda was cautious in his observation that since Malaysia has been awarded sovereignty over the islands, the implications of the judgment on the delimitation of the continental shelf should be viewed from a different angle, for Article 83 of the 1982 LOSC calls for an "equitable solution" in continental shelf delimitation. This issue has not been addressed in the judgment which means that the dispute over the continental shelf has not been settled between the parties as yet.³⁴

Besides, the above scenario on the continental shelf, the rule on the exhaustion of local remedies has to be observed in the case of the Spratly Islands, also outlined above, which are fiercely contested by States such as Malaysia, the Philippines, Indonesia, Vietnam, China, Taiwan and Brunei. The 2002 Declaration of the Conduct of Parties in the South China Sea has eased tensions over the Spratly Islands but it is not legally binding. Malaysia was not a party to the March 2005 Joint Accord among the national oil companies of China, the Philippines and Vietnam on conducting marine seismic activities in those islands. Fierce military skirmishes have occurred between the Philippines, China, Vietnam, Brunei and Malaysia in the South China Sea. Between Malaysia and Indonesia, there is a conflict over the left maritime boundary in the hydrocarbon-rich Celebes Sea and the concessions to the Ambalat oil block which saw hostile confrontations in March 2005. The Philippines dormant claim to Malaysia's state of Sabah in Northern Borneo is a thorn in diplomatic relations between the two States. Malaysia and Brunei have had problems in oil and gas exploration in

³⁴ *Id* at p 13.

their disputed offshore and deepwater sea-beds where negotiations have stalemated prompting consideration of international adjudication.

Armed robberies, piracy and terrorist activities in these seas have also alerted these littoral States to co-operation. The overlapping exclusive economic zone claims of States in the South China Sea has given rise to counterclaims, conflicts, and use of military power to back these claims. One such account is the dispute between Malaysia and Brunei when an oil well was discovered about 100 miles offshore from Sabah within the 200 nms EEZ claimed by Brunei since 2000, which in turn has re-kindled an earlier dispute over offshore rights between the two States. Murphy Oil has been working on this site with Petronas of Malaysia. The Jakarta Post reported on 18 March 2005 that Malaysia's foreign minister was ready to defend Malaysia's oil rights at a meeting with Indonesian counterparts over a disputed maritime area in the Sulawesi sea believed to be rich in oil. The report states that Malaysian and Indonesian warships were sent to the Sulawesi Sea, east of Borneo, where Shell was given an oil concession by Malaysia's Petronas in the disputed area in February.

Both governments agreed to ease the tension by holding talks. The Foreign Minister of Malaysia is reported to have said that there will be many more such meetings until both parties agree through diplomatic means.³⁵ Malaysia's Chief of Armed Forces warned that when diplomacy failed, military force was the only answer. The Indonesian response to this was that security had been stepped up in the area and that the islands would be defended against any problem. Malaysia proposed in 1994 that the matter could be settled at the ICJ after another Joint Working Group that year failed to produce any result. Indonesia rejected Malaysia's claim publicly and replied that the matter should be settled by way of bilateral negotiations and failing that, by a decision of the ASEAN High Council. Secret talks started between two Senior Government officers after the matter was taken out of the hands of the two Foreign Ministries.

³⁵ See the Jakarta Post.com, "Latest News; Malaysia ready to defend oil rights at Indonesian meeting: FM", 18 March 2005.

Diplomatic measures failed and Indonesia suggested that the matter should be taken to the ICJ, whereupon, the Heads of State then agreed to submit the dispute to the ICJ in October 1996 and a committee was appointed to work out the details of the submission in the midst of Indonesian fears that a body that did not understand the issue would now meddle in it.³⁶ It is reported that Indonesia has taken the lead role in peace-making through the ASEAN mechanism by hosting the first workshop in this series in 1990. These issues were later discussed at the ASEAN Regional Forum (ARF) in conjunction with the ASEAN Post Ministerial Conference which drew 22 States in the Asia-Pacific region including ASEAN members. The deliberations acknowledged that for the pacific settlement of disputes, the ASEAN Ministers had to adopt a regional code of conduct. This was drafted by the Philippines and Vietnam with a view to undertaking scientific research, and for purposes of combating piracy and drug-trafficking. China began a dialogue with ASEAN on the idea of a code of conduct to govern actions by claimants. It is noteworthy that contentious issues involving sovereignty were left out. The ASEAN approach was to push for a moratorium on further claims in the Spratlies as opposed to the Chinese position on a moratorium on further actions that would complicate the situation. In November 2002, China and the ten members of ASEAN signed a Joint Declaration on the Conduct of Parties where they pledged to undertake to resolve their territorial and jurisdictional disputes by peaceful means without resorting to the threat of force.

The Malaysian Foreign Minister stated that it was his belief that ASEAN nations had agreed that territorial disputes were an ASEAN issue and should not be resolved in other international fora. Vietnam has had bilateral working groups with China to resolve disputed boundaries in the Gulf of Tonkin, referred to as the Beibu-Wan by China and Vinh Bac Bo by Vietnam, and in the Spratlys. The Gulf of Tonkin dispute was resolved in an agreement concluded in December 2000. Vietnam wanted to include the dispute over the Paracel islands in a "code of conduct" but the idea did not receive the necessary support from other ASEAN members because the Paracels dispute

³⁶ See Haller-Trost, *supra* n 29 at pp 257-260.

was only between Vietnam and China. Malaysia and Brunei have held talks in 2003 on their overlapping and conflicting EEZ claims, but have not reached an agreement. It is reported that there have been incidents in 2003 where naval vessels from Brunei and Malaysia have acted without the actual use of force to prevent exploration vessels from working in the disputed area. As a member of the ARF, China was of the view that the resolution of territorial disputes should be a bilateral issue. Opposed to this view, was the US position that all ARF members should have an interest in issues affecting the peace and stability of the region and that the ARF was the appropriate forum for the resolution of these conflicts. Achieving temporary stability through the adoption of a code of conduct and working groups is part of the ADR technique. Experience shows that when a dispute becomes critical, the States parties prefer to use the ICJ.

V. ADR in ASEAN

A. *The High Council*

The significant dispute settlement provisions of the 1976 ASEAN Treaty of Amity and Co-operation in South-East Asia are Articles 13 to 16. The basic premise is to prevent a dispute from arising and where it has arisen, to settle it peacefully and not to reject offers of assistance where these are forthcoming. So the provisions of Article 13 call upon States to "prevent disputes from arising". Article 14 urges all States to settle their disputes through regional processes. To this end, the Contracting Parties are mandatorily required to constitute a body known as the High Council comprising a Representative at the ministerial level from each of the Contracting Parties and to take cognisance of the existence of disputes or situations likely to disturb regional peace and harmony. Article 15 provides that if no solution has been reached through direct negotiations, the High Council shall take note of the dispute or the situation and recommend to the parties in dispute appropriate means of settlement such as good office mediation, inquiry or conciliation.

The High Council may however, offer its good offices, or upon agreement of the parties in dispute, constitute itself into a committee of mediation, inquiry or conciliation. When deemed necessary, the High Council shall recommend appropriate measures for the prevention of a deterioration of the dispute or the situation. The terms of Article 16 clearly lay down that the provisions of this Charter are not to apply to a dispute unless all the parties to the dispute agree. However, this shall not prejudice the other Contracting Parties not party to the dispute from offering all possible assistance to settle it. Parties to the dispute should be well - disposed towards such offers of assistance. Article 17 permits these States to have recourse to the other modes of peaceful settlement as enshrined in Article 33(1) of the Charter of the United Nations. The Contracting Parties which are party to a dispute are encouraged to take initiatives to solve it by friendly negotiations before resorting to the other procedures provided for in the Charter of the United Nations.

There are some difficulties in using these provisions under the ASEAN treaty for dispute settlement as identified by Malaysia in the Pulau Ligitan and Pulau Sipadan Case. The first of these problems was identified as a burden on the other ASEAN states and that the ASEAN High Council could not be expected to play an impartial or neutral role as the state faced territorial issues with other ASEAN states as well. The High Council could only make recommendations which in themselves were not binding upon the parties. Finally, there lurked the fear of jeopardising relations with other member states. Based on these reasons it is submitted that the powers of the High Council are rather vaguely defined and the principles used for dispute settlement not necessarily legal ones.

In the Pulau Ligitan and Pulau Sipidan Case, Haller-Trost traced the steps that were taken before the dispute was submitted to the ICJ as follows:

1. The first step consisted in agreeing that the dispute fell beyond the scope of the work of the General Border Committee whose task was to demarcate the mainland border between the mainland states of Sabah and Sarawak on the one hand and Indonesia on the other.

2. The parties established a separate body in July 1991 which met at the Joint Commission Ministerial Meeting. No consensus could be reached.
3. The parties decided to submit the dispute to a newly created Joint Working Group comprising senior legal officers and hydrographers. A stalemate occurred after numerous documents were exchanged and meetings held. An inflexible attitude on the part of both parties developed.
4. Malaysia's Chief of Armed Forces warned that when diplomacy failed, military force was the only answer. The Indonesian response to this was that security had been stepped up in the area and that the islands would be defended against any problem.
5. Malaysia proposed in 1994 to settle the matter at the ICJ after another Joint Working Group meet that year failed to produce any result.
6. Indonesia rejected Malaysia's claim publicly and replied that the matter should be settled by way of bilateral negotiations and failing that, a decision by the ASEAN High Council.
7. Secret talks started between two senior government officers after the matter was taken out of the hands of the two Foreign Ministries. Diplomatic measures failed and Indonesia suggested that the matter be taken to the ICJ.
8. The Heads of States (then) agreed to submit the dispute to the ICJ in October 1996 and a committee was appointed to work out the details of the submission in the midst of Indonesian fears that a body that did not understand the issue would now meddle in it.³⁷

³⁷ See Haller-Trost, *supra* n 29 at pp 257-260.

Besides the ASEAN High Council, there are several other provisions on dispute settlement concluded fairly recently in ASEAN such as the Declaration of ASEAN Concord II (Bali Concord II) which has three provisions on the importance of peaceful settlement of intra-regional differences in Part A entitled ASEAN Security Community. Paragraph 1 of Part A has a mandatory requirement that ASEAN Security Community members rely exclusively on peaceful processes in the settlement of intra-regional differences and regard their security as fundamentally linked to one another as they are bound by geographic location, common vision and objectives. In Paragraph 4 too, there is a mandatory requirement that the ASEAN Security Community abide by the UN Charter and other principles of international law and uphold ASEAN's principles of non-interference, consensus-based decision making, national and regional resilience, respect for national sovereignty, the renunciation of the threat or use of force and above all the peaceful settlement of disputes. Paragraph 7 states that the High Council shall be the important component in the ASEAN Security Community since it reflects ASEAN's commitment to resolve all differences, disputes and conflicts peacefully.

The argument here does not countenance the establishment of an ASEAN Court for there is no ASEAN judge and no ASEAN rule of procedure for the regional settlement of international ocean law disputes. For instance, there should not and need not be any arbitral tribunal setting aside the injunctive powers of the International Tribunal for the Law of the Sea. By adopting a stronger ADR culture, ASEAN should contribute to greater security and stability in the region and to the jurisprudence of the law of the sea. The role of ADR in the resolution of international ocean law disputes in ASEAN should serve as a demonstration of the faith that these States have in ADR. If ADR fails then the states can accept in faith the universal and general subject-matter jurisdiction of the ICJ and of ITLOS.

VI. Elements of ADR

A. *Fact Finding Procedure*

For the resolution of disputes of a scientific or technical nature in the Straits of Malacca and Singapore and the South China Sea, it may be advisable to set up fact-finding commissions whose findings are considered conclusive unless of course a party to the dispute can establish error in the report. All concerned States should prepare a roster of competent scientific and technical staff who are able to act as commissioners. It is up to the parties to adopt the appropriate standard of error such as gross error before discrediting a commission's report. The burden of proof is borne by the party who challenges the report of the commission. Such a commission should have the power to resolve the impugned matter. Sometimes a settlement need not have a legal character and supervision of the legality of measures may not be necessary. Where legal measures are deemed necessary, littoral states should provide for such measures in their bilateral or multilateral treaties and attempt a sub-regional or regional remedy before the unresolved matter goes to an international tribunal.

B. *Objections to a Decision*

It is important for parties engaged in a specialised dispute settlement process, to understand that there could be objections to the decision, and consequently provide some grounds for objection and finally to incorporate bases for engaging in binding dispute settlement procedures. When a party to a dispute objects to the decision arrived at through a specialised procedure, that party should have recourse to a binding dispute settlement. The grounds of objection may include lack of jurisdiction, excess of jurisdiction or competence, violation of procedural rules, or violation of the spirit and intent of a treaty, error on a question of law, or fundamental failure of justice. This approach has several precedents in international law such as Article 173 of the Treaty Establishing the European Economic Community, and Article 11(1) of the Statute of the United Nations Administrative Tribunal.

C. *Disputants*

Article 34.1 of the Statute of the ICJ provides that only States may be parties in cases before the Court. Article 34.2 gives the Court the power to request public international organisations to impart information relevant to cases before it and can receive such information on their own initiative. Article 35.1 states that the Court shall be open to the States Parties to the present Statute. The issue of inequality of parties is addressed in Article 35.2 which reads: The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court. These principles of law may be applied to disputants at ADR. Besides States Parties, disputants may also arise (as discussed *supra*) from international-intergovernmental organisations, any specialised agency of the United Nations, and any non-governmental international organisation or any National Liberation Organisation whose credentials have been accepted for admission by the General Assembly of the United Nations. States have a duty to make a determination on whether the principle of sovereign equality of States should be extended to the other disputants as well.

D. *National Courts*

Generally, the local remedies rule may be fulfilled where the matter has been brought before a national court. The question whether sub-regional or regional level ADR would fulfill the "exhaustion of local remedies rule" is answered when we examine the terms of reference in Article 33 of the UN Charter. Where the matter is settled in a municipal court, the burden of proof is upon the party challenging the findings of the municipal court. States parties who desire to invoke the jurisdiction of their municipal court have a duty to inform the other party within a certain time frame. Article VIII (2) of the Convention relating to Intervention on the High Sea in Cases of Oil Pollution Casualties 1969 states that the party which took measures shall not be entitled to refuse a request for conciliation or arbitration under provisions of the preceding paragraph solely on the grounds that any remedies under municipal law in its own court have not been exhausted.

The award or decision given by the court of law should be consonant with the international law of the sea. Where the municipal law or constitutional law of the other State party to the dispute cannot implement the decision, the injured party shall be given equitable satisfaction. There may be no further appeal municipally. Where there is dissatisfaction, international law recognises that the matter can be submitted to the international court. So, the States Parties to a dispute should state the role played by the international adjudicatory bodies such as the ITLOS, the ICJ and/or the PCA once the local remedies rule has been exhausted.

The applicable law for consideration by the States Parties will cover the 1982 LOSC and related treaties and other international or regional instruments concluded by the concerned States which are not inconsistent with the 1982 LOSC.

At the sub-regional and regional levels, States Parties can also rely on equity jurisdiction which recognises the fact that the provisions of the instrument shall not prejudice the right of the parties to a dispute to agree that the dispute shall be settled *ex aequo et bono*. States Parties are always free to state the exceptions and reservations they have to the ADR mechanisms by excluding certain categories of ships or subject-matter from their purview. Or alternatively, they may add more to their scope.

Without referring to the term "ADR", the 1982 LOSC underscores the role of the ADR mechanisms such as negotiation, mediation, arbitration, conciliation, good offices and enquiry. Arbitration, unlike other options, has a special place as it is accompanied by an award that is binding upon the parties.

VII. Conclusion

While the conference on the law of the sea rejected a classification of disputes, it included disputes concerning the interpretation or application of the Convention. However, ocean law disputes are a mixture of international politics, geography, history, law and science

covering baselines, maritime zones, title to territory, *uti possidetis juris*, inter-temporal laws, *non-liquet* situations, marine pollution, overexploitation of living and non-living resources, unsustainable development of the seas and oceans, obtaining information by false methods such as prohibited marine scientific research and illegal transfer of marine technology, illegal and unlawful military and strategic use of the seas, military and naval activities, to name a few.

Besides these, there are several other bilateral, regional and multilateral areas of concern in the regional seas which may be further simplified as concerns centering on sovereignty, maritime criminal law, safety of state and shipping, responsible fishing practices, unsustainable use and development of the marine environment, and marine biology including intellectual property rights in marine scientific research and traditional knowledge of local and indigenous populations. Offences against people and property include piracy, safety of nationals and theft, armed robbery at sea, and maritime terrorism. In turn they raise questions of state jurisdiction. Issues relating to biotechnology, marine products and intellectual property rights of stakeholders and maritime environmental concerns are intertwined and to this extent, these disputes may have to be settled under the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism mentioned in the Abstract to this paper. Intellectual property law issues focus on traditional knowledge, genetic resources of the sea and their patents and trademarks. Finally, biological concerns center on the scientific data regarding the life of the seas and their adverse impact on the coastal human population. All of these issues could be settled by use of the ADR techniques under the ASEAN umbrella if the parties are willing and trusting of each other.

At present, there is no ASEAN court for the settlement of international ocean law disputes, and there may be no case for creating one as a regional court might only complicate issues further such as its relationship to municipal courts, *stare decisis* and *res judicata*. If ASEAN were to adopt a judicial system for international ocean law adjudication, it should cover areas not within the scope of the ICJ or ITLOS bearing in mind the relationship between ASEAN and the ICJ

or ITLOS.³⁸ Such a regional court could focus on disputes between citizens and the State. Even if such a court were to be set up, there is no guarantee that the littoral States will use this forum. ASEAN should encourage all the littoral States to engage in serious ADR techniques for the realisation of its dreams and goals. While dispute settlement may be ongoing, the imprimatur in Article 38(1) of the 1982 LOSC underscores the absolute freedom of navigation of ships and aircraft in the regime of the straits. There may be no suspension of this vital right.

This paper has argued that given the magnitude and scope of the imminent issues in the law of the sea waiting to explode within ASEAN, the ADR culture must be revived within the region and its sub-region. It points out that while the ASEAN treaty system is underutilized due to the basic insecurity of the parties, and current ADR efforts are not entirely effective which is evidenced in States Parties resort to the international dispute settlement system, the ADR culture must be given a boost.³⁹

As a legal educationist, the implications of encouraging the widespread use of ADR techniques would mean that supporting courses must be given at the undergraduate level to the law student within the main framework of core legal studies. This is a matter for further deliberation.

³⁸ See Judge Higgins, "The ICJ, the ECJ and the Integrity of International Law" (2003) 52 *ICLQ* at 15-19.

³⁹ Since the writing of this article, the ASEAN Charter adopted on 20 November 2007 has extensive provisions on Settlement of Disputes in Chapter VIII, Articles 22-28 where the role of ADR has been given a boost.